

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 2, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP2543-CR**

**Cir. Ct. No. 2008CF88**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**BENNIE L. BERRY,**

**DEFENDANT-APPELLANT.**

---

APPEAL from a judgment and an order of the circuit court for Brown County: TIMOTHY A. HINKFUSS, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Bennie Berry appeals a judgment of conviction and an order denying postconviction relief. Berry contends that: (1) he established a fair and just reason to withdraw his plea prior to sentencing; and (2) his plea was

not knowing, intelligent, and voluntary. We reject these contentions. Accordingly, we affirm.

### *Background*

¶2 In January 2008, Berry was charged with repeated sexual assault of a child. The victim, J.D.B., reported that, while she was twelve years old, Berry had repeatedly sexually assaulted her. J.D.B. testified at a preliminary hearing that the assaults occurred at an apartment in Green Bay, beginning in January 2007 and ending in May 2007. Berry was bound over for trial.

¶3 On October 7, 2008, Berry appeared in court with his attorney, Raj Singh, for a scheduled jury trial. Before the jury was brought in, Singh informed the court that Berry had decided to accept the plea deal offered by the State. The court conducted a plea colloquy, and then accepted Berry's no-contest plea.

¶4 On October 14, 2008, prior to sentencing, Berry filed a pro se motion to withdraw his plea. Berry argued that he did not receive the effective assistance of counsel because Singh had failed to hire a private investigator or to subpoena defense witnesses for trial; that his plea was coerced because Singh informed him he would lose at trial; and that he did not understand the terms of the plea agreement. Singh withdrew as counsel and successor counsel was appointed to represent Berry on his motion for plea withdrawal.

¶5 Singh testified at the evidentiary hearing on the plea withdrawal motion as follows: Berry had provided Singh with the names of potential defense witnesses and asked him to hire a private investigator. Singh conducted an investigation into calling the people on the list, but did not hire a private investigator because he did not believe the expense was justified. Singh's

investigation included contacting or attempting to contact Berry's daughters, T.B. and M.B., and Berry's mother. Singh was aware that the victim had reported that Berry had also sexually assaulted T.B. T.B. and M.B. claimed that they did not have enough money to travel from their homes in Chicago to the trial in Green Bay to testify on their father's behalf. Singh found that explanation unbelievable, and interpreted it to mean that they would not have testified favorably for Berry. Berry's mother claimed that she had just started a new job and did not want to take time off for the trial, and Singh did not believe her testimony would be relevant or persuasive. Singh did not subpoena any witnesses to testify at trial. Singh was prepared to represent Berry at trial on the scheduled trial date, and believed that Berry's wife, who was present and willing to testify, was the only potentially helpful witness on the witness list Berry had provided.

¶6 Berry testified that he had expected Singh to secure his named witnesses for trial, and that he was surprised when his witnesses were not present in court on the morning of trial. He stated Singh had not informed him prior to trial that he would not call the witnesses Berry had named, and that Berry was very concerned that those witnesses were not present for trial. He stated he did not believe he had any chance at trial without his witnesses present, and that he would have gone to trial if his witnesses had been there.

¶7 The circuit court found that Berry had not established a fair and just reason to withdraw his plea. It found that Berry's testimony as to his concern over witnesses was not credible, and that Singh had made a viable trial strategy decision not to subpoena witnesses or hire a private investigator. The court also referenced the plea colloquy, wherein Berry stated he was satisfied with Singh's representation and agreed that he had taken into account all of the pros and cons

and decided to enter a plea of his own free will. Accordingly, the court denied Berry's motion for plea withdrawal.

¶8 After sentencing, Berry filed a postconviction motion to withdraw his plea. He asserted that: (1) he was denied the effective assistance of counsel when Singh failed to subpoena T.B. or witnesses to contest the dates J.D.B. claimed Berry lived at the apartment in Green Bay, and failed to obtain the Brown County Department of Human Services records for the victim, which Berry claimed would have provided evidence of the victim's history of lying and mental illness; (2) that Berry's plea was not knowing, intelligent, and voluntary because Singh was unprepared for trial; and (3) that a trial was required in the interest of justice.

¶9 At the motion hearing, Singh testified to the following: Berry informed Singh that, while J.D.B. claimed the assaults occurred at a particular apartment in Green Bay from January 2007 to May 2007, Berry did not move into that apartment until mid-February 2007. Singh did not investigate that issue as a possible defense because he determined that the discrepancy in dates would not have been a significant issue to the jury. Singh did not have any record of attempting to obtain the Brown County Department of Human Services records for J.D.B. However, his general practice in this type of case was to obtain such records only when he had a specific reason to believe they contain helpful information; otherwise, he presumed the information would be hurtful to his client.

¶10 Berry presented testimony establishing that he had moved into the apartment J.D.B. identified as the site of the sexual assaults on February 12, 2007, and had vacated the apartment on May 31, 2007. He also presented testimony that

the Brown County Department of Human Services file for J.D.B. included evidence that J.D.B. had made a threatening phone call to her foster parents' son; that her foster parents were concerned about her lying and that she had lied to both her foster parents and human services workers; and that she had been diagnosed with severe depression and anxiety. Additionally, T.B. testified that Singh contacted her once and said he would contact her again, but never did, and did not return her phone calls. She stated she told Singh that she had not been sexually assaulted by Berry, and that she was willing to testify at trial but could not afford to travel to Green Bay from Chicago.

¶11 The circuit court denied Berry's postconviction motion. It found that Berry did not establish that Singh provided ineffective assistance of counsel by failing to fully investigate the case or subpoena witnesses. It found that the only potential witness to testify at the postconviction motion hearing, T.B., did not provide credible testimony as to her willingness to testify at the original trial; that Berry did not establish that he was coerced into entering his plea by the lack of defense witnesses on the day of trial; that the evidence that Berry did not move into the apartment J.D.B. identified until February 2007 was not significant to the defense; and that there was no evidence that a private investigator could have uncovered additional information. The court also found that Berry had not established that Singh was ineffective by failing to obtain Brown County Department of Human Services records for J.D.B., because there was nothing in the records that would have influenced Berry's decision to enter a plea. The court found that Berry had entered a voluntary plea after a thorough colloquy, and that the court had properly denied Berry's motion to withdraw his plea prior to sentencing. Finally, the court determined that Berry was not entitled to a new trial in the interest of justice. Berry appeals.

*Standard of Review*

¶12 A circuit court’s decision on a motion for plea withdrawal is within its discretion. *State v. Jenkins*, 2007 WI 96, ¶6, 303 Wis. 2d 157, 736 N.W.2d 24. We affirm a discretionary determination “as long as it was demonstrably made and based upon the facts appearing in the record and in reliance on the appropriate and applicable law.” *Id.* (quoted sources omitted). We defer to a circuit court’s credibility determinations unless those determinations are clearly erroneous. *See id.*, ¶33.

¶13 “Whether a plea is knowing, intelligent, and voluntary is a question of constitutional fact. We accept the circuit court’s findings of historical and evidentiary facts unless they are clearly erroneous but we determine independently whether those facts demonstrate that the defendant’s plea was knowing, intelligent, and voluntary.” *State v. Brown*, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906 (quoted source omitted). Whether counsel provided ineffective assistance, as well, is a mixed question of fact and law. *See State v. Jeannie M.P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. We will uphold a circuit court’s factual findings unless those findings are clearly erroneous, but we independently review whether those facts meet the constitutional standard of effective assistance of counsel. *Id.*

¶14 Ultimately, whether the facts entitle the defendant to withdraw his plea is a question of law, which we review de novo. *See Jenkins*, 303 Wis. 2d 157, ¶34.

## *Discussion*

### *Presentence Motion*

¶15 “[A] circuit court should ‘freely allow a defendant to withdraw his plea prior to sentencing for any fair and just reason, unless the prosecution [would] be substantially prejudiced.’” *Id.*, ¶2 (quoted source omitted). Haste and confusion in entering a plea, as well as coercion by trial counsel, are fair and just reasons to withdraw a plea. *State v. Shimek*, 230 Wis. 2d 730, 739, 601 N.W.2d 865 (Ct. App. 1999). Additionally, if a defendant has established he was denied a relevant constitutional right, he is entitled to withdraw his plea as a matter of law. *Jenkins*, 303 Wis. 2d 157, ¶32 n.9.

¶16 Berry contends that he established a fair and just reason for plea withdrawal prior to sentencing by showing that Singh provided ineffective assistance of counsel. Berry contends that Singh did not have a valid trial strategy for failing to subpoena T.B. as a defense witness for trial, and that he would not have entered a no-contest plea if Singh had secured T.B.’s testimony. *See Jeannie M.P.*, 286 Wis. 2d 721, ¶¶6-7, 26 (claim of ineffective assistance of counsel requires showing that counsel’s performance was deficient—that is, counsel’s performance was unreasonable and fell outside the wide range of professionally competent assistance—and that the deficient performance prejudiced the defense—that is, but for counsel’s errors, there is a reasonable probability the outcome of the proceedings would have been different). Berry contends that it was unreasonable for Singh to interpret T.B.’s statement that she did not have sufficient funds to travel from Chicago to Green Bay as communicating that she would not testify favorably for Berry. He cites *State v. Domke*, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364, for the proposition that a trial attorney’s

presumption of a witness's testimony without actual investigation is deficient performance. He also argues that his plea was coerced because Singh failed to secure defense witnesses and Berry did not feel that counsel was ready for trial. We are not persuaded.

¶17 In *Domke*, the supreme court held that counsel's performance was deficient when he called a witness at trial without having fully investigated what she would say on the stand. *Id.*, ¶¶50-53. Although counsel had information from Domke as to what the witness believed, counsel did not speak with the witness before calling her to the stand or further investigate what she believed at the time of trial. *Id.*, ¶51. In holding that counsel's performance was deficient, the supreme court stated: "[C]ounsel has a duty to make reasonable investigations' or to make a strategic decision that makes further investigation unnecessary." *Id.*, ¶52 (quoted source omitted). Counsel did not provide any reason for failing to speak with the witness before trial, and thus had not made a strategic decision. *Id.* The court said that "[a] reasonable attorney ... would have done some investigation when faced with the risk of calling a witness who may provide either extremely useful or extremely damaging testimony." *Id.*

¶18 Here, in contrast, Singh testified that he decided not to subpoena T.B. as a deliberate trial strategy after being told that T.B. could not afford to come to Green Bay from Chicago for the trial. Singh testified that he interpreted T.B.'s explanation as unreasonable, and thus determined she was really communicating that she did not have anything favorable to Berry to say on the stand. Thus, Singh conducted a further investigation into the witness's testimony, as contemplated in *Domke*, and made a trial strategy decision not to force Berry's daughter to be a defense witness when she did not express a willingness to come



to trial. We conclude that counsel's decision was within the wide range of professionally competent assistance.

¶19 Berry also argues that he was coerced to enter his plea when Singh failed to subpoena witnesses for trial and Berry felt that counsel was unprepared. However, as the circuit court noted, the court conducted an extensive colloquy with Berry to establish that he had made a voluntary decision and that he was satisfied with Singh's representation. Berry does not dispute the sufficiency of the plea colloquy or contest that the court adequately addressed this issue prior to accepting Berry's plea. *See Jenkins*, 303 Wis. 2d 157, ¶60 ("As long as circuit courts follow the court mandated and statutory requirements during plea colloquies, defendants will ordinarily have difficulty showing a fair and just reason for plea withdrawal if the reason is based on grounds that were adequately addressed in the plea colloquy.").

¶20 Additionally, the supreme court has explained that whether a defendant's claims establish a manifest injustice "depends heavily on whether the [circuit] court finds the defendant's testimony or other evidence credible and persuasive." *Id.*, ¶34. Thus, "[i]f 'the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" *Id.* (quoted source omitted). Here, the circuit court did not believe Berry's asserted reason for wanting to withdraw his plea.

#### *Postconviction Motion*

¶21 A post-sentence motion for plea withdrawal "'must show the withdrawal is necessary to correct a manifest injustice.'" *Id.*, ¶2 n.2. (quoted source omitted). If the defendant's plea was not knowing, intelligent, and

voluntary, or the defendant was denied the effective assistance of counsel, a manifest injustice has occurred. *See State v. Cain*, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177.

¶22 Berry contends that his plea was not knowing, intelligent, and voluntary, asserting again that he was coerced into entering a plea by Singh's lack of preparation for trial. Berry argues that his plea was involuntary as a matter of law because Singh was ineffective by failing to adequately prepare for trial. *See generally State v. Bartelt*, 112 Wis. 2d 467, 334 N.W.2d 91 (1983). Berry identifies the following evidence from the postconviction motion hearing as establishing Singh was ineffective by failing to secure defense testimony and evidence prior to Berry's trial date: (1) testimony by T.B. that she informed Singh that she had not been sexually assaulted by Berry as J.D.B. claimed, and that she was willing to testify at trial; (2) evidence that Berry did not move into the apartment where J.D.B. claimed the sexual assaults occurred until mid-February 2007, rather than in January 2007 as J.D.B. claimed; and (3) evidence in J.D.B.'s records with the Brown County Department of Human Services that J.D.B. had a history of lying and mental illness. Again, we are not persuaded.

¶23 As explained above, Singh testified to his strategic decision to not subpoena witnesses who did not express a willingness to come to trial and testify on Berry's behalf. The circuit court found that Singh's testimony as to his efforts and strategy was credible, and that T.B.'s testimony that she was willing to testify but simply lacked funds to come to Green Bay was not credible. We have no basis to disturb the court's credibility determinations on appeal.

¶24 Additionally, we do not agree that counsel was ineffective by failing to pursue evidence that Berry moved into the apartment identified as the site of the

sexual assaults in February rather than January of 2007. Singh testified that he did not believe that evidence would have supported a viable defense, and we agree that that was a reasonable trial strategy decision. A one-month discrepancy in the move-in date at an apartment, and a corresponding one-month discrepancy in the date a child victim believes sexual assaults began, is not significant. We are not persuaded by Berry's argument that counsel was ineffective by failing to secure this evidence, or that Berry was coerced by the lack of that evidence on the trial date.

¶25 Finally, we reject Berry's argument that counsel was ineffective by failing to secure J.D.B.'s Brown County Department of Human Services records, or that Berry was coerced to enter his plea by Singh's failure to obtain those records. Berry argues that the information in the file—that J.D.B. had repeatedly lied to her foster parents and social workers, had reported hearing voices, and had been diagnosed with severe depression and anxiety—would have impacted J.D.B.'s credibility at trial. However, we agree with the circuit court and the State that the type of lying Berry identifies in the records (as to weight loss, a boyfriend, and leaving a sports game early) was not the type of lying that would significantly undermine J.D.B.'s credibility as to her claims of sexual assault. Additionally, Berry did not present any evidence as to how J.D.B.'s mental health history would have caused her to fabricate claims of sexual assault. Ultimately, Berry has not explained why he would not have pled guilty if he had known of J.D.B.'s mental health history at the time of his scheduled trial.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

